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No. 87-142

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTH AFRICAN AIRWAYS,
Petitioner,

v.

ELIZABETH H. DOLE, SECRETARY
U.S. DEPARTMENT OF TRANSPORTATION,
Respondent.

Reply Brief of Petitioner In Support of Petition for a Writ of Certiorari

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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Petition for a Writ of Certiorari presents to the Court the important question whether the Government correctly applied statutory language to abrogate an international agreement of the United States, when another reasonable construction of the statutory language would avoid such abrogation.

The Government, in its Memorandum in Opposition, ignores the issue as being of no moment. Petitioner urges that abrogation of an international agreement of the United States by government action, in whatever context it arises, is of considerable moment.

1. The critical issue is not, as the Government contends, whether the foreign air carrier permit of petitioner should terminate in November of 1986 or

in October of 1987. The issue in this case is the extent to which Congress must express in clear statutory language that the United States is acting to abrogate an international agreement of the United States.

As the Government has noted, "[t]he United States exchanges commercial aviation operating rights with other countries through bilateral agreements." (Resp. 1). The United States maintains many such agreements with countries worldwide, and the vast majority of such agreements contain termination clauses comparable to the provisions in Article VI and Article XI of the Agreement with the Government of South Africa.[1] This case raises the question: When the United States has agreed to Article VI and Article XI(D), what kind of congressional action is required to terminate the operating rights of a flag carrier contrary to the terms of the Agreement?

The attempt of the Government to depict this dispute as one which solely involves petitioner and the termination date of petitioner's operating rights ignores the issue presented.[2] The statutory language in

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[1] Article VI specifies the circumstances under which a foreign air carrier permit of a carrier of one party may lawfully be revoked by the government of the other party, and Article XI contains the procedure for the termination of the Air Transport Agreement itself.

[2] The Government does not argue that expiration of the Air Transport Agreement would render the issue presented moot, but instead argues that "the scope of the question presented, whether or not it is technically moot, is so narrow that certiorari is not warranted." (Resp. 5 n.2)

Expiration of the Air Transport Agreement would not render moot the important public issue presented herein which is "capable of repetition," but would "evad[e] review" due to the

§306(a) of the Anti-Apartheid Act directing the revocation of the foreign air carrier permit of petitioner can be applied in a manner which either terminates the permit immediately, as was done, or terminates the permit in the future, i.e., at a point coincident with the one-year termination date of the Air Transport Agreement. Neither the Court of Appeals for the District of Columbia Circuit, nor the Government in its Memorandum in Opposition, have disputed that 306(a)(2) may be applied in either manner.[3]

Furthermore, neither the Court of Appeals nor the Government have disputed (1) that the construction of §306(a)(2) which was adopted, requiring immediate termination of service by petitioner, violates the Air Transport Agreement or (2) that a construction of §306(a)(2) which would terminate the operating rights of petitioner simultaneously with the termination of the Air Transport Agreement would not violate the Agreement. In this case, the question facing the Sec-

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short, one year period until the termination of a bilateral aviation agreement becomes effective. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911); *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983); *Mandel v. Bradley*, 432 U.S. 173, 175 n.1 (1977); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Brown v. Chote*, 411 U.S. 452, 457 n.4 (1973).

[3] The argument of the Government (Resp. 6 n.3) that the position of petitioner would render §306(a)(2) a nullity is not valid. Sections 402 and 416, respectively, of the Federal Aviation Act, 49 U.S.C. §1372, §1386 (1982), permit the U.S. Government to grant permits and exemptions from the permit requirement to foreign air carriers, even though a bilateral air transport agreement may not be effective and controlling. Section 306(a)(2), however, would preclude the continuation or issuance of any operating authority to South African Airways, even after the termination of the Air Transport Agreement.

retary of Transportation was which construction should be placed on the statute. Given the fact that these two alternate constructions of §306(a)(2) are possible based upon the statutory language alone, the required construction under the decisions of the Court is one which would avoid the contravention of an international agreement of the United States. That is, if it is possible to interpret a statute in order to avoid violation of a treaty, that interpretation should be followed, notwithstanding some evidence of legislative support for a contrary interpretation.

The Government argues in response that the position of petitioner is that Congress's intent cannot be carried out unless Congress chooses "the right magic words" (Resp. 5). If that is how the Government characterizes the decisions of the Court which require that congressional action inconsistent with treaties and international agreements of the United States must be so clear that no other such construction of the language employed is possible to avoid violation of the Agreement, petitioner adopts that position unreservedly. Petitioner relies fully upon the long-established precedent of the decisions of the Court that while Congress may take action inconsistent with an international treaty of the United States it must do so explicitly. *Chew Heong v. United States*, 112 U.S. 536, 549-50 (1884).

The question of congressional intent is not so settled as it is portrayed by the Government. Although the Senate did adopt the amendment which subsequently included §306(a)(2) of the Anti-Apartheid Act as a result of the stated desire of certain senators for an immediate termination of the foreign air carrier permit of petitioner, it is *not* clear that Congress

wanted immediate revocation or termination if such action *did* violate the Air Transport Agreement. (Pet. 7-8). Since the Government does not dispute the fact that a revocation prior to expiration of the Air Transport Agreement does violate the international agreement in this case, it is therefore all the more important that Congress must *spell out* its desire to revoke in breach of the international agreement.

Petitioner does not dispute that Congress *can* take action which revokes or is inconsistent with a treaty or international agreement of the United States. As petitioner has repeatedly argued, however, in order to do so Congress must state the action which is required in language which would not permit the provisions of the affected treaty to remain effective.

The Government's statement also seems to imply that petitioner argues that legislative intent is never a factor in statutory interpretation. That, of course, is not petitioner's argument. Legislative intent is always relevant in constructing a statute. If an international agreement were not affected by such a construction, evidence of congressional intent in the legislative history is perhaps the *best* aid in determining a proper construction to be placed upon an ambiguous statute.

Where, however, a construction, whether derived from legislative history or from the application of other traditional rules of statutory construction, would abrogate a treaty provision or stipulation in an international agreement it must then be determined, under the decisions of the Court, whether another construction of the statutory language is possible to avoid the abrogation of the treaty or international agreement.

The Government correctly states that "petitioner contends that a court may look only at the language of the statute in question to determine whether it nullifies or supersedes a provision of an international agreement." (Resp. 9). The decisions of the Court so hold, and the Government has cited none to the contrary.

In *Weinberger v. Rossi*, 456 U.S. 25 (1982), the Court examined the legislative history to support a construction which *gave effect to* an executive agreement. The policy underlying the *Weinberger* decision is one applicable to the present case, that is, if reasonably possible, a construction which gives effect to a treaty or international agreement is to be employed.

In *Chew Heong v. United States*, 112 U.S. 536 (1884), the parties offered interpretations of the statute which were both arguably valid options, but one interpretation of the statute would result in violation of the treaty in question. In applying the " 'recognized rules of interpretation' (112 U.S. at 554)," cited by the Government (Resp. 9), the Court adopted the interpretation which avoided interpreting the statute to violate the treaty. This is precisely the approach which the Secretary of Transportation should have adopted in implementing §306(a)(2) of the Anti-Apartheid Act.

The Government does not attempt to distinguish *United States v. Lee Yen Tai*, 185 U.S. 213 (1902), which, according to the Government,

> stands for the unremarkable preposition that, when a statute and a treaty "are not absolutely irreconcilable," the Courts should, "if possible" give effect to both (185 U.S. at 222).

(Resp. 9). While the proposition of *Lee Yen Tai* may be "unremarkable," it embodies a significant principle governing the proper interpretation of treaties and statutes, a principle which the Government fails to apply to the case at bar. Because it cannot quarrel with this proposition, the Government is left with no alternative but to assert "that petitioner's construction of Section 306 is simply not 'possible' in light of Congress's clearly expressed intent." (Resp. 9). This kind of statement ignores the language of §306(a)(b) itself which the Court of Appeals conceded could literally be interpreted to support petitioner's position, (Pet. App. 9a), a position which would have avoided abrogation of an international agreement.

CONCLUSION

For the reasons in its petition and in this reply brief, the Court should grant the petition for a writ of certiorari.

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